SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 8, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Buckley, Acosta, JJ.

174 Sarah Antonio, et al., Index 27138/02
Plaintiffs-Appellants,

-against-

Gear Trans Corp., et al.,
Defendants-Respondents,

Dario Castro, et al.,
Defendants.

Eric H. Green, New York (Hiram Anthony Raldiris of counsel), for appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, New York County (Kenneth L. Thompson, Jr., J.), entered April 3, 2008, which granted the motion of defendants Gear Trans Corp. and Niamke Agniman for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain serious injuries within the meaning of Insurance Law § 5102(d), affirmed, without costs.

Defendants met their burden of establishing prima facie that plaintiffs did not sustain permanent consequential or significant limitations by submitting the affirmations of several doctors who, upon examining plaintiffs and performing objective tests,

concluded that plaintiffs' injuries were resolved and, in plaintiff Ventura's case, that her right ankle injury was caused by a prior car accident (*see e.g. Charley v Goss*, 54 AD3d 569, 570-571 [2008], *affd* 12 NY3d 750 (2009); *Figueroa v Castillo*, 34 AD3d 353 [2006]). Defendants also established that plaintiffs had no 90/180-day injury through plaintiffs' deposition testimony indicating that Antonio returned to school a week after the accident and was confined to home for one week, and that Ventura was confined to bed and home for only two weeks (*see Lloyd v Green*, 45 AD3d 373 [2007]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]).

Plaintiffs failed to raise an issue of fact with respect to their 90/180-day claims. Their treating physician's statements that they were "medically disabled" throughout the time they were under her care and that she advised them to, among other things, refrain from any work or other activities that might cause them discomfort or pain are too general to raise the inference that plaintiffs were unable to perform their usual and customary activities during the statutorily required time period or that their confinement to bed and home was medically required (*see Gorden v Tibulcio*, 50 AD3d 460, 463 [2008]).

Plaintiffs failed to raise a triable issue of fact whether Ventura sustained a significant or permanent consequential limitation to her cervical spine or right ankle, since their

treating physician did not perform any tests on those body parts during her most recent examination of Ventura (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005]). Further, since the physician failed to review Ventura's medical records concerning her prior right ankle injury, there is no objective basis by which to attribute any new injuries to the later accident (*Gorden*, 50 AD3d at 464). Plaintiffs also failed to raise an issue of fact regarding a significant or consequential limitation of use of Antonio's right knee since their physician failed to quantify her initial findings, identify any objective tests and compare her findings to normal ranges, and failed to perform any tests on Antonio's right knee in her last two examinations (*see Lattan v Gretz Tr. Inc.*, 55 AD3d 449, 449-450 [2008]).

As to plaintiffs' alleged additional spinal injuries, their physician's conclusory findings on her September 24, 2007 examination of Ventura's lumbar spine and Antonio's cervical and lumbar spine, using an inclinometer, that Antonio had "significant limitations when comparing [her] cervical and lumbar spine to what would be considered normal" and that Ventura had "permanent consequential limitation of use of her neck, back and right ankle when compared to what would be considered normal," were insufficient to raise an issue of fact as to serious injury. Moreover, the physician's conclusion, arrived at seven years later, that those injuries, namely bulging discs, were causally

related to plaintiff's May 14, 2000 accident and were permanent, consequential and significant failed to offer any quantitative assessment of the range of motion in terms of numeric percentage, or of how the accident reduced the functioning of plaintiffs' spines below the level of function that existed immediately before the accident (*see Suarez v Abe*, 4 AD3d 288 [2004]).

With respect to the seven-year gap in plaintiffs' respective treatment, aside from the fact that these paragraphs of the physician's affidavits are identical except for a reference to the right ankle in the affidavit concerning Ventura and to the right knee in the affidavit concerning Antonio, the physician's conclusory opinion that, after five or six months of "active physical therapy," plaintiffs "reached a plateau" and physical therapy "was discontinued on [her] recommendation because [she] felt [plaintiffs] had reached maximum medical improvement with therapy" is insufficient under the circumstances to explain this gap (*see Eichinger v Jone Cab Corp.*, 55 AD3d 364, 364-365 [2008] [14-month gap in treatment]; *see also Franchini v Palmieri*, 1 NY3d 536 [2003] [plaintiff's experts provided "no foundation or objective medical basis supporting the conclusions they reached"]).

All concur except Acosta, J. who dissents in part in a memorandum as follows:

ACOSTA, J. (dissenting in part)

I dissent only to the extent that I would deny defendants' motion with respect to the alleged injuries to plaintiff Ventura's lumbar spine and plaintiff Antonio's lumbar and cervical spine.

Contrary to the majority's holding, plaintiffs raised an issue of fact with respect to Ventura's alleged lumbar spine injury. Their physician's conclusion that Ventura's injuries, i.e., bulging lumbar discs, were causally related to the accident and were permanent, consequential and significant was supported by objective evidence, namely, the MRI and CT scan reports and the positive straight leg raising tests (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 355 [2002]; *Brown v Achy*, 9 AD3d 30, 32 [2004]). While the physician did not ascribe a specific percentage to the loss of range of motion in Ventura's lumbar spine, she sufficiently described Ventura's limitations qualitatively on the basis of the lumbar spine's normal function, in particular, by correlating Ventura's bulging discs with her inability to perform such normal daily tasks as sitting, standing, walking and driving for long periods of time and such household chores as laundry, cleaning floors, and carrying groceries (*see Toure* at 355).

Plaintiffs also raised an issue of fact with respect to Antonio's alleged lumbar and cervical spine injuries. Their

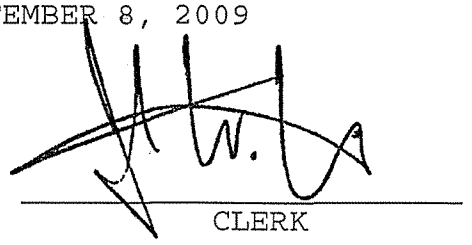
physician's conclusion that those injuries, namely bulging discs, were causally related to the accident and were permanent, consequential and significant was supported by objective medical evidence, including the MRI reports, the positive straight leg raising tests, and her observations of muscle spasms during her examination of Antonio's cervical spine (*see Toure*, 98 NY2d at 353, 355; *Brown*, 9 AD3d at 32). As in Ventura's case, the physician did not quantify the loss or limitation in Antonio's lumbar and cervical spine during her most recent examination, but she sufficiently described Antonio's limitations qualitatively "based on the normal function, purpose and use of the body part[s]" (*see Toure*, 98 NY2d at 353, 355).

With respect to the seven-year gap in treatment, the physician's explanation that plaintiffs had reached maximum medical improvement with physical therapy and that she had advised them to continue home therapy was sufficient to raise an issue of fact (*see Pommells v Perez*, 4 NY3d 566, 577 [2005] [doctor's explanation that, once he determined further medical therapy would "be only palliative in nature," he terminated treatment and instructed plaintiff to continue exercises at home

was sufficient. "A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury."]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Andrias, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

5305 Bovis Lend Lease LMB Inc., et al., Index 103616/05
Plaintiffs-Respondents,

-against-

Garito Contracting, Inc., et al.,
Defendants-Appellants.

Melito & Adolfsen, P.C., New York (Louis G. Adolfsen of counsel), for Garito Contracting, Inc., appellant.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for Twin City Fire Insurance Company, appellant.

Newman Myers Kreines Gross Harris P.C., New York (Olivia M. Gross and Howard Altman of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 31, 2008, which, insofar as appealed from, granted the motions of defendant insured Garito Contracting, Inc. (Garito) and defendant insurer Twin City Fire Insurance Co. (Twin City) to renew their prior motions for dismissal of the complaint and summary judgment, respectively, and, upon renewal, adhered to the prior order declaring that plaintiff general contractor Bovis Lend Lease LMB Inc. (Bovis) is an additional insured entitled to coverage, modified, on the law, to the extent of declaring that Bovis is not entitled to indemnification, and otherwise affirmed, with costs.

Bovis is an insured under the policy issued by Twin City to its insured, Garito, which was hired to perform demolition work. The plaintiff in the underlying personal injury action, John

Armentano, sought to recover for injuries he sustained when he fell through an opening in the floor of the job site. The hole was created when a garbage chute was removed by Garito during its demolition work. Although Bovis and Garito had entered into a subcontract for the performance of the demolition work, neither party was able to locate a copy of the contract. Thus, the terms of the contract were at issue in the underlying personal injury action. In particular, there was an issue regarding whether or not Garito was obligated under the contract to perform temporary protection work.

In this declaratory judgment action, Bovis moved for summary judgment, arguing that its contract with Garito entitled Bovis to coverage as an additional insured on the policy issued by Twin City to Garito. Garito cross-moved for dismissal of the complaint and Twin City cross-moved for summary judgment. The motion court granted Bovis' motion and denied the cross motions. This Court affirmed, finding that "[a]lthough the contract was lost, Bovis properly established, through extrinsic evidence, that it required Garito to procure insurance coverage on its behalf" (*Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 38 AD3d 260, 261 [2007]) (*Bovis I*). Our decision finding that a contract existed requiring Garito to procure coverage for Bovis as an

additional insured said nothing with regard to the additional terms of the contract, as those terms properly were an issue for the jury in the underlying action.

In the underlying action, the jury found that: (1) Bovis was negligent and that its negligence was a substantial factor in causing Armentano to fall through the hole, and (2) Garito also was negligent but that its negligence was not a substantial factor in causing Armentano to fall. The jury's determination included a finding that Bovis did not prove that Garito agreed to provide temporary protection at the work site. Thereafter, in this action, Twin City moved to renew its motion for summary judgment and Garito joined in the motion. The court granted renewal but adhered to its prior determination.

Upon renewal, the court should have granted the motions based on the jury's determination in the personal injury action. The insurance policy issued by Twin City provided coverage to Bovis "only with respect to liability arising out of: . . . '[Garito's] work' for [Bovis] . . . or . . . [a]cts or omissions of [Bovis] in connection with [its] general supervision of '[Garito's] work.'" As is apparent from the jury's verdict, Bovis' liability neither arose out of Garito's work nor out of Bovis' supervision of Garito's work.

This case is controlled by *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]). In *Worth*, Murphy, the plaintiff

in the underlying action, fell on stairs constructed by a subcontractor, Pacific, having slipped on fireproofing that had been applied to the stairs by another subcontractor. Supreme Court initially declared that the general contractor, Worth, was entitled to a defense and indemnification as an additional insured under the policy issued to Pacific, which provided coverage to Worth "only with respect to liability arising out of [Pacific's] operations" (10 NY3d at 415). Worth subsequently conceded, however, that the negligence claim it had asserted against Pacific in its third-party action was without merit and should be dismissed. Pacific's insurer then moved to renew its motion for summary judgment in the declaratory judgment action brought by Worth; Supreme Court granted the motion, holding that "Worth's concession that Pacific was not negligent established as a matter of law that Murphy's accident did not arise out of Pacific's operations and therefore [Pacific's insurer] was not required to defend or indemnify Worth under the terms of the policy" (10 NY3d at 415).

A divided panel of this Court reversed (40 AD3d 423 [2007]), but the Court of Appeals reversed and reinstated the order of Supreme Court awarding summary judgment to Pacific's insurer (10 NY3d at 415). As the Court held, "[o]nce Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the

accident. Therefore, it could no longer be argued that there was any connection between Murphy's accident and the risk for which coverage was intended" (*id.* at 416). Notably, the policy defined the term "[y]our work" to include "[m]aterials, parts or equipment furnished in connection with [Pacific's] work or operations" (*id.*). The Court nonetheless held that "the fact that the stairs constituted '[m]aterials, parts or equipment furnished in connection with [Pacific's] work or operations' under the 'Your work' provision, [did not] entitle Worth to defense and indemnification where, as here, Worth conceded that the stairs themselves were not a proximate cause of Murphy's injury" (*id.* [first and second brackets in original]).

As Twin City argues, the jury's finding that Garito's negligence was not a substantial factor in causing Armentano to fall is as conclusive as the admission by Worth that Pacific's activities were not a proximate cause of the underlying accident. That finding, after all, established that Bovis' liability did not arise out of Garito's work for Bovis or out of acts or omissions of Bovis in connection with its general supervision of Garito's work. To the contrary, the jury found that Bovis' liability arose out of its own work (*see also Harriman Estates Dev. Corp. v General Acc. Ins. Co.*, 309 AD2d 575 [2003]). Just as the staircase created by Pacific was "merely the situs" of the accident, so, too, the hole created by Garito was "merely the

situs" of the accident. Thus, as *Worth* makes clear, "liability arising out of" a named insured's work is absent where, as here, the named insured is absolved of liability. Accordingly, to require Twin City to indemnify Bovis is to confer a windfall on Bovis' insurer, plaintiff National Union Fire Insurance Co.

Our decision in *Bovis I* does not require a different result. We neither required Twin City to indemnify Bovis nor found that Bovis would be entitled to indemnification for its own negligence. As the broad duty to defend "'arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim'" (*Worth*, 10 NY3d at 415, quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]), we properly held that Twin City was obligated to provide Bovis with a defense. In the absence of a jury finding in the underlying action, any claim of an entitlement to indemnification would be premature. To the extent that our opinion may be interpreted as providing for defense and indemnification, we clarify that we required only coverage for a defense. The possibility of a jury finding that would obligate Garito to indemnify Bovis was sufficient to trigger Twin City's obligation to provide a defense (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 715 [2007]).

What justified our holding in *Bovis I* -- the possibility of a jury finding that would obligate Garito to indemnify Bovis --

cannot justify a holding that Garito is obligated to indemnify Bovis. To the contrary, the negation of that possibility by the jury's actual finding should be given effect on the issue of indemnity (*see Harriman Estates*, 309 AD3d at 575-576; *City of Niagara Falls v Merchants Ins. Group*, 34 AD3d 1263 [2006]).

The dissent loses sight of the well-settled principle that the duty to defend is broader than the duty to indemnify (*BP A.C.*, 8 NY3d at 714-715; *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989]). As has long been recognized, "[t]he insured's right to representation and the insurer's correlative duty to defend suits . . . are in a sense 'litigation insurance' expressly provided by the insurance contract" no matter how baseless the allegations contained in the complaint may be (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 423-424 [1985]). "A declaration that an insurer is without obligation to defend a pending action could be made 'only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy'" (*id.* at 424, quoting *Spoor-Lasher Co. v Aetna Cas. & Sur. Co.*, 39 NY2d 875, 876 [1976]). "The duty to indemnify is, however, distinctly different" because "the duty to pay is determined by the actual

basis for the insured's liability to a third person" and is not measured by the allegations of the pleadings (*Servidone*, 64 NY2d at 424).

The dissent would hold that Twin City is obligated to indemnify Bovis on the basis of nothing more than the facts that triggered Twin City's duty to defend. Thus, the dissent points to the "causal relationship" between Armentano's injuries, "sustained when he fell through a hole undisputably created by Garito," and "the risks of demolition work for which coverage was intended." Putting aside a jury verdict completely exonerating Bovis, under the dissent's approach it is far from clear whether any jury verdict could have terminated the additional insured coverage obligations of Twin City to Bovis. If not, what triggers the duty to defend also triggers the duty to indemnify, even though the latter duty is distinct from the former. It may be, however, that the dissent would conclude that Twin City would not be obligated to indemnify Bovis if the jury had found that Armentano was not injured by falling through the hole created by Garito. But such a verdict and the actual verdict -- that Bovis' own negligence, not the hole created by Garito, was the proximate cause of Armentano's injuries -- are legal equivalents. As the "actual basis for the insured's [i.e., Bovis'] liability to a third person [i.e., Armentano]" (*Servidone*, 64 NY2d at 424) is Bovis' own negligence, Twin City has no duty to pay.

Because we find that Twin City is not obligated to indemnify Bovis, we need not reach defendants' additional arguments.

All concur except Andrias, J.P. and DeGrasse, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (dissenting)

This appeal involves the question of whether general contractor Bovis is still entitled to a declaration that it is an additional insured under a policy issued to its subcontractor Garito Contracting by Twin City Fire Insurance, after the jury in the underlying personal injury action has found that both Garito and Bovis were negligent, but that Garito's negligence was not a substantial factor in causing the plaintiff's accident. For the following reasons, I dissent and would affirm the declaration that Bovis is an additional insured under the Twin City policy issued to Garito and that such policy provides Bovis with primary coverage for the underlying claim.

As part of a project to add a J.C. Penney Store to the Broadway Mall in Hicksville, New York, Garito was hired by Bovis to perform demolition work and, pursuant to its subcontract with Bovis, obtained a primary commercial general liability insurance policy, which named Bovis as an additional insured and afforded coverage to Bovis "with respect to liability arising out of" Garito's work for Bovis. Garito's demolition work included the removal of a garbage chute enclosure down to the concrete floor slab. As a result, there was a hole left in the concrete slab. At some subsequent time, John Armentano, a union carpenter working for another subcontractor, lifted a four by eight-foot sheet of plywood that was covering the hole and, not seeing the

hole, fell through the hole onto a concrete floor 18 feet below. He and his wife brought a personal injury action in Nassau County against the mall's owner, its manager, Bovis and J.C. Penney in which Garito was named as a third-party defendant. On a prior appeal in this declaratory judgment action, we held that Bovis was entitled to coverage under Garito's policy and that the liability issues raised in the underlying personal injury action need not be determined for the purpose of determining coverage (38 AD3d 260 [2007]).

The personal injury action was subsequently tried and there was a dispute as to whether Garito, Bovis, or another subcontractor hired by Bovis was responsible for temporarily covering the hole in the slab. The jury found that both Garito and Bovis were negligent, but that Garito's negligence was not a substantial factor in causing the accident. The jury also found that Bovis failed to prove that Garito agreed to provide the temporary protection of the work site that caused the accident.

Garito and Twin City relying upon *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]) then moved in this action to renew the coverage issue on the ground that the jury's verdict absolving Garito from liability should result in a declaration that Twin City has no obligation to indemnify Bovis in the underlying action. The motion court ruled in favor of Bovis and this appeal followed.

In *Worth,* the general contractor of an apartment complex under construction contracted with Pacific Steel, Inc. for the construction of the staircase and handrailings. Pacific provided commercial general liability insurance naming Worth as an additional insured and providing coverage arising out of Pacific's work. After Pacific installed the staircase, which consisted of two "stringers" (sides) welded to a steel pan, the project was turned over to Worth, who hired a concrete subcontractor to fill the pans. Once the concrete had been poured and walls were erected around the stairs, Pacific was to return to complete its portion of the project by affixing the handrailings to the walls. Pacific was not on the job, had completed construction of the stairs and was awaiting word from Worth before returning to affix the handrails at the time an ironworker sustained injuries when he slipped on some fireproofing material on the staircase.

Worth sought defense and indemnification from Pacific's insurer, contending that the simple fact that the ironworker slipped on the staircase established as a matter of law that his accident arose out of Pacific's work because the staircase was part of the "materials" that Pacific was utilizing to fulfill its subcontract. The Court of Appeals disagreed and found that the focus of the additional insured clause "is not on the precise cause of the accident but the general nature of the operation in

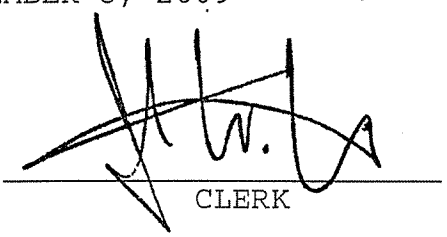
the course of which the injury was sustained" (10 NY3d at 416) (internal quotation marks and citation ommitted). The only basis in the complaint for asserting any significant connection between Pacific's work and the accident was the allegation that the stairway was negligently constructed. Once Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the accident was not caused by the stairs but merely happened there. Therefore, the Court found, "it could no longer be argued that there was any connection between [the] accident and the risk for which coverage was intended" (*id.*).

Here on the other hand, Twin City's argument and the majority's conclusion, that the jury's finding that Garito's negligence was not a substantial factor in causing Armentano to fall is as conclusive as Worth's admission that Pacific's work was not the cause of the underlying accident in that case, is unconvincing. Moreover, *Harriman Estates Dev. Corp. v General Acc. Ins. Co.* (309 AD2d 575 [2003]) cited by the majority, is clearly distinguishable on its facts. Unlike *Worth*, where it was conceded that Pacific was *not negligent*, the jury here found Garito *negligent*. Armentano's accident and Bovis's liability clearly "arose out of" or "in connection" with Garito's work withing the meaning of *Worth* since, in concluding that Garito was negligent, the jury necessarily found that its work was somehow involved in the accident. Under the circumstances presented in

this case, the hole was more than the mere situs of the accident and it cannot be said that there was no connection between the accident and the risk for which coverage was intended. The causal relationship between the underlying plaintiff's injuries, sustained when he fell through a hole undisputedly created by Garito in performing its demolition work, and the risks of demolition work for which coverage was intended, is clear (*see Worth* at 415; *see also id.* at 416 [["g]enerally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations"]; *cf. Pepe v Center for Jewish History, Inc.*, 59 AD3d 277 [2009]). The motion court also properly adhered to its determination on the priority of coverage issues since no new facts or issues of law were raised by Twin City on its motion to renew.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Andrias, J.P., Saxe, Sweeny, Freedman, JJ.

579 Simon Lorne, et al., Index 602769/07
Plaintiffs-Respondents,

-against-

50 Madison Avenue LLC, et al.,
Defendants-Respondents,

Goldstein Properties LLC, et al.,
Defendants,

The Board of Managers, et al.,
Defendants-Appellants,

50 Madison Avenue Condominium,
Additional Defendant-Appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellants.

Zetlin & De Chiara LLP, New York (James H. Rowland of counsel), for Lorne respondents.

Epstein Becker & Green, P.C., New York (Ralph Berman of counsel), for 50 Madison Avenue LLC and Samson Management LLC, respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered December 26, 2008, which, to the extent appealed from, denied the motion by defendants-appellants condominium board of managers (the Board) and one of its individual members (David Moffitt) for summary judgment dismissing plaintiff unit owners' cause of action for breach of fiduciary duty as against them, and granted plaintiffs' cross motion for leave to serve an amended complaint adding additional defendant-appellant 50 Madison Avenue Condominium as a party and, inter alia, a new

cause of action for a judgment declaring who, as between the sponsor defendants, on the one hand, and the condominium or the Board, on the other, is responsible for repairing the defective floor in plaintiffs' unit, unanimously reversed, on the law, without costs, defendants-appellants' motion granted and plaintiffs' cross motion denied. The Clerk is directed to enter judgment dismissing the complaint as against defendants-appellants.

Plaintiffs allege that the concrete slab or "substrate" under the hardwood floors in the unit they purchased from the sponsor defendants was not properly leveled and flattened, resulting in numerous loose floorboards and warping in some areas; that the sponsors acknowledged that the floors in the unit had been improperly installed and undertook to replace the floors; that after several unsuccessful attempts by the sponsors to correct the problem, plaintiffs decided to undertake the repairs themselves; that the Board demanded that plaintiffs sign a standard "Alteration/Installation Agreement" before commencing work; that plaintiffs proposed changes to the agreement so that it would reflect, inter alia, that the proposed work was not alterations but the completion of flooring in accordance with the original plan; and that the Board demanded that plaintiffs pay it an unreasonable amount ($15,000 or $10,000) to retain counsel to review plaintiffs' proposed changes to its standard agreement.

The Board and its individual members moved for summary judgment dismissing plaintiffs' cause of action for breach of fiduciary duty on the ground that the Board's demands that plaintiff sign the alteration agreement and pay its attorney's retainer were made in good faith pursuant to express authority conferred in the offering plan and are therefore protected by the business judgment rule.

The Court of Appeals has decided that the appropriate standard by which the decisions of a board of managers of residential condominiums are reviewed "is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 [1990]).

> "This 'deferential standard' that has become the hallmark of the business judgment rule requires courts to 'exercise restraint and defer to good faith decisions made by boards of directors in business settings'. . . 'To trigger further judicial scrutiny, an aggrieved [unit owner] must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith'" (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 8-9 [2006] [internal citations omitted]).

Recognizing that standard, the motion court nevertheless denied the motion to dismiss the cause of action for breach of fiduciary duty as against the Board and David Moffitt, finding that plaintiffs had raised issues of fact whether the Board acted

outside the scope of its authority and in bad faith.

In so ruling, the court found that plaintiffs had sufficiently alleged that, although the sponsor is not required to repair defects to concrete elements unless so requested by an independent Board member, the Board advised them that it had no obligation to take any action in connection with the necessary repair to the concrete substrate of their unit, and the court noted that the Board appeared to have taken that position in this lawsuit. It also found that a question of fact whether the Board's demand that plaintiffs sign a standard "Alteration/Installation Agreement" was made in good faith, because plaintiffs maintain that the necessary work is not a "renovation" or "alteration" of their apartment but the repair and correction of a construction defect and that the clear language of section S-4.1 of the condominium offering plan, entitled "Maintenance and Repairs of Units," applies only to "Alterations" and is optional.

However, contrary to the court's reading of it, section S-4.1 specifically provides that each unit owner "*must* obtain the written Reasonable Approval of the Condominium Board before undertaking any extraordinary or *structural Repairs*. *The Board may condition its approval on [the unit owner's] compliance with the same requirements that apply to Unit Alterations (see* subsection S-5.1 below)" (emphasis added). Section B-8 of the

condominium offering plan ("Glossary") includes the concrete slab or substrate underlying the floors in its definition of "Structural Components," and plaintiffs in their brief "do not question that the floor slab problem, and indeed, the entire floor installation, is a construction defect." Section P-3.8 of the offering plan provides that it is the sponsor's obligation to correct construction defects.

Plaintiffs admit that after the sponsor failed to install the hardwood flooring in their unit properly they "took over the installation of the floors." They retained an engineer, who advised them that the concrete substrate was uneven. They allege, in conclusory fashion, that the Board refused either to make the necessary repairs or to permit them to do so. However, that allegation is based on the Board president's statement that the Board was not going to involve itself in plaintiffs' dispute with the sponsors, and that statement was made in response to plaintiffs' May 24, 2007 letter, entitled "Construction Defect Correction Notice," notifying the Board that they intended to start reinstalling the floors within 10 days. Plaintiffs sent the letter after a copy of the Board's standard alteration agreement had been forwarded to their attorney. The agreement requires, in pertinent part, that unit owners wishing to make alterations to their unit provide the Board with a complete set of plans, etc.; secure proof of insurance covering the

condominium, the managing agent and the unit owner; pay a refundable $5,000 deposit against possible damages and costs and a nonrefundable alteration review fee of $500; and assume all risks of damage to the building. It provides that said assumption of risk will not affect any contributory liability or third-party liability of others who cause damage or a problem, or the duty of the condominium to maintain or repair the building.

Plaintiffs then proposed numerous changes to the alteration agreement, which the Board determined were too numerous and complex for it to consider without advice. Thus, pursuant to section 5.2.4(k) of the condominium's bylaws, which provides that the unit owner "shall pay or reimburse the Board for the Costs and Expenses it incurs in connection with the review of the construction drawings . . . of the proposed Unit Alterations/Repairs, [and] *the execution of such Building standard Unit Alteration agreement . . . including fees and disbursements of* the Board's architect, engineer, *attorneys*, professionals, consultants and Managing Agent," the Board requested a $15,000 retainer from plaintiffs so that it could hire an attorney to review their proposed changes.

Despite the Board's assertion that it was acting to further a legitimate interest of the condominium because alterations of structural components of a building have the potential of endangering or adversely affecting other unit owners, the motion

court found that a question of fact was raised by plaintiffs' allegations that the floors were not fixed, that they themselves sought to fix them, that they obtained liability insurance to cover the work, and that consent was improperly withheld. However, it was not unreasonable for the Board to require plaintiffs to adhere to the same rules that apply to all other unit owners wishing to make structural repairs. Plaintiffs' opposition was insufficient to raise a question of fact as to the Board's good faith or whether it was acting within the scope of its authority and in furtherance of a legitimate purpose, and defendants-appellants' motion for summary judgment should have been granted as against the Board.

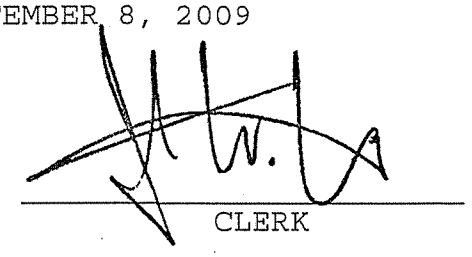
As to plaintiffs' cause of action for breach of fiduciary duty against David Moffitt, which is based on their claim that, as a result of a dispute over a tax abatement issue, he threatened at a July 10, 2007 meeting of the unit owners to "make it very difficult" for them to ever have their floors installed, it is undisputed that the Board actions that are the subject of plaintiffs' complaints of breach of fiduciary duty all predate Moffitt's election to the Board in mid-July of 2007. Thus, the cause of action should also have been dismissed as against Moffitt.

Finally, since the pertinent parts of the condominium offering plan are clear and unambiguous, plaintiffs' cross motion

to amend the complaint to add the condominium as a party and to assert a cause of action for a declaratory judgment should have been denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Andrias, J.P., Moskowitz, DeGrasse, Richter, JJ.

727 Zana Dobroshi, etc., Index 104034/06
Plaintiff-Respondent-Appellant,

-against-

Bank of America, N.A., etc.,
Defendant-Appellant-Respondent.

Zeichner Ellman & Krause LLP, New York (Stephen F. Ellman of counsel), for appellant-respondent.

Toptani Law Offices, New York (Edward Toptani of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 24, 2008, which, inter alia, granted defendant's motion for partial summary judgment to the extent of dismissing the second through sixth causes of action, denied the motion to the extent it sought dismissal of the seventh and eighth causes of action and denied defendant's motion to strike the class action allegations from the complaint, unanimously modified, on the law, to deny the motion for partial summary judgment as to the second cause of action, to grant the motion for partial summary judgment dismissing the seventh and eighth causes of action, and to grant the motion to strike the class action allegations, and otherwise affirmed, without costs.

Contrary to defendant's claim, the second cause of action pleads fraud with sufficient particularity to satisfy CPLR 3016(b) (*see Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). It

informs defendant that plaintiff complains of the significant increase in settlement costs between the Good Faith Estimate of Settlement Services (GFE) and the HUD-1 statement, and of the fact that she was informed about this increase only one day before the closing.

Plaintiff's allegation that defendant deliberately underestimated settlement costs to induce her to obtain a loan from it, rather than from a competing lender states a claim for fraud (*see Wright v Selle*, 27 AD3d 1065, 1067-1068 [2006]). The GFE was not a mere statement of future intent (*see Watts v Jackson Hewitt Tax Serv., Inc.*, 579 F Supp 2d 334, 352 [ED NY 2008]), and the issue of material misrepresentation is not subject to summary disposition (*see e.g. Brunetti v Musallam*, 11 AD3d 280, 281 [2004]).

The motion court also noted that plaintiff went forward with the closing despite the increased costs. However, under the circumstances, that was the only sensible thing for plaintiff to do (*see Negrin v Norwest Mtge.*, 263 AD2d 39, 50 [1999]). Contrary to defendant's contention, plaintiff's damages are not speculative. She alleges that she was forced to pay $4,000 for defendant's attorney's services, that this amount was excessive, that the GFE estimated that the attorney's fees would be $450, and that the prevailing customary charge in New York City for the lending bank's attorney's fees ranges from $450 to $800.

Furthermore, because the fraud claim is reinstated, plaintiff's demand for punitive damages is also reinstated, since "[i]t is for the jury to decide whether [defendant's actions] were so reprehensible as to warrant punitive damages" (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1996]).

The third cause of action (negligent misrepresentation) was correctly dismissed. "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). This court has repeatedly held that an arm's length borrower-lender relationship is not of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation (*see Korea First Bank of NY v Noah Enterprs. Ltd.*, 12 AD3d 321, 323 [2004], *lv denied* 4 NY3d 710 [2005]; *River Glen Assocs., Ltd. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [2002]; *FAB Indus. v BNY Fin. Corp.*, 252 AD2d 367 [1998]; *Heller Fin. v Apple Tree Realty Assocs.*, 238 AD2d 198, 199 [1997], *lv dismissed* 90 NY2d 889 [1997]; *Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359, 360 [1995]). Defendant's alleged superior knowledge of, among other things, the legal fees typically charged by its counsel does not constitute the "unique

or special expertise" required to depart from this rule.

For similar reasons, the fourth cause of action (breach of the duty to disclose) was correctly dismissed. Plaintiff has not established that defendant's superior knowledge of essential facts renders the transaction without disclosure inherently unfair (*see generally Swersky v Dreyer & Traub*, 219 AD2d at 327-328) and plaintiff's claim of excessive fees fails to overcome the rule that the legal relationship between a borrower and a bank is a contractual one and does not give rise to a fiduciary relationship (*see Bank Leumi Trust Co. v Block 3102 Corp.*, 180 AD2d 588, 589 [1992], *lv denied* 80 NY2d 754 [1992]); *Trustco Bank, Nat. Assn v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797, 799 [1998]).

The fifth cause of action (conversion) was properly dismissed. "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [citations omitted]). Here, the motion court did not dismiss the conversion claim because of plaintiff's failure to satisfy the first element. Rather, it dismissed the claim due to her failure to satisfy the second element.

The sixth cause of action (unjust enrichment) was properly

dismissed. It is not sufficient that a defendant is enriched; rather, the enrichment must be unjust (*see McGrath v Hilding*, 41 NY2d 625, 629 [1977]). While the closing costs more than doubled between the GFE and the HUD-1, defendant did not retain this increase.

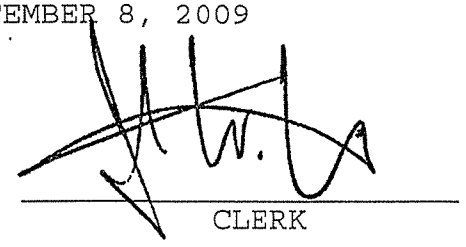
The record shows that defendant has met its burden of showing that it is entitled to judgment as a matter of law dismissing the seventh and eighth causes of action alleging negligent training and negligent supervision, respectively. Plaintiff has not identified the laws, rules, regulations, and best practices standards that defendant allegedly violated (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]). Further, plaintiff, who has not sued any bank employee, has not shown that defendant knew of any "employee's propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure" (*N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 42 [2001], *mod on other grounds* 97 NY2d 247 [2002]) or that defendant's alleged negligent training was the proximate cause of plaintiff's injuries.

The motion court should have stricken the class action allegations. First, individual issues will predominate because all claims under General Business Law § 349 will require analysis of whether the ultimate closing costs were so unreasonable as to amount to a deceptive practice (*cf. Weil v Long Island Savings*

Bank, FSB, 200 FRD 164, 174 [ED NY 2001] [distinguishing a case where each plaintiff would have to provide evidence of the services performed compared to a case where the plaintiffs claim that the alleged scheme was illegal per se]). Moreover, plaintiff contends that defendant's bad faith in making estimates is actionable. However, to determine if defendant acted in bad faith, it will be necessary to individually examine each of the tens of thousands of transactions at issue. Finally, plaintiff's proposed class would number in the thousands and would have individually tailored written disclosures, different types and amounts of fees and different reasons for the increase in closing costs. These circumstances negate the possibility that common questions would predominate (*see Rose v SLM Fin. Corp.*, 254 FRD 269, 272-73 [WD NC 2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Saxe, J.P., Buckley, McGuire, Moskowitz, Acosta, JJ.

752-
752A The People of the State of New York, Ind. 2207/07
Respondent,

-against-

John C. Kelly,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eleanor J. Ostraw of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered November 1, 2007, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 6 years, affirmed. Order, same court and Justice, entered on or about December 8, 2008, that denied defendant's motion pursuant to CPL 440.10 and 440.20 to vacate the judgment and set aside the sentence, affirmed.

On October 11, 2007, defendant appeared with counsel and pleaded guilty, pursuant to a plea agreement, to attempted robbery in the second degree. At the plea proceeding, defendant was adjudicated a second violent felony offender because of a prior Maryland conviction for the crime of abducting a child under 12 years old. Defendant admitted to the Maryland conviction, and, after conferring with counsel, answered in the

negative when asked if he was making a constitutional challenge to the Maryland conviction. The Clerk then arraigned defendant on the predicate violent felony statement that alleged, inter alia, that the Maryland conviction represented "an offense which includes all of the essential elements of a violent felony as that term is defined in Penal Law § 70.02."

On July 8, 2008, defendant moved, pursuant to CPL 440.10 and 440.20, to vacate his conviction and set aside his sentence, claiming that he was actually not a predicate violent felony offender, that he pleaded guilty under the mistaken belief he was and that his guilty plea was therefore involuntary. Defendant also claimed that his attorney was ineffective for not challenging his predicate violent felony adjudication at the plea proceeding.

Because defendant failed, during the plea proceedings, to raise the issue of whether the statute under which he was convicted in Maryland is the equivalent of a New York violent felony, defendant has waived that issue (*People v Smith*, 73 NY2d 961 [1989]). As the Court of Appeals noted in *People v Samms* (95 NY2d 52, 57 [2000]):

> "Determining whether a particular out-of-State conviction is the equivalent of a New York felony may involve production and examination of foreign accusatory instruments and, conceivably, the resolution of evidentiary disputes, all in the context of comparisons with the law of other jurisdictions. In keeping with the rule of preservation, issues of that type must be raised and explored at the trial court

level, where a record is developed for appellate review" (internal citations omitted).

Here, defendant pleaded guilty after a negotiated plea deal and declined the opportunity to challenge the prior Maryland conviction as the basis for the predicate violent felony. Because of the plea agreement, defendant received substantially less of a prison sentence than he would have had he gone to trial and been found guilty. We will not set aside this bargain, the product of careful negotiations between the People and defendant's counsel, merely because of defendant's belated argument that the Maryland conviction did not constitute a predicate violent felony under New York law.[1]

As an alternative holding, we find that defendant was properly adjudicated a second violent felony offender. Defendant claims that the court should not have sentenced him as a second violent felony offender primarily because: (1) his out-of-state conviction in Maryland is not equivalent to a New York violent felony and (2) the People's predicate felony statement failed to set forth any tolling periods while relying on a conviction that was more than 10 years old.

Penal Law § 70.04(1)(a) states, "A second violent felony

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[1] Our recent decision in *People v Bennett* (60 AD3d 478 [2009]) has no bearing on this appeal. In that case, the People did not argue waiver and conceded that the defendant was improperly sentenced and we found their argument that defendant's exposure as a predicate felon did not affect his plea to be speculative.

offender is a person who stands convicted of a violent felony offense . . . after having previously been subjected to a predicate violent felony conviction . . ." Penal Law § 70.04(1)(b) states:

> "For the purpose of determining whether a prior conviction is a predicate violent felony conviction the following criteria shall apply: (i) The conviction must have been . . . of an offense which includes all of the essential elements of [a New York violent] felony . . ."

Thus, "[t]o determine whether a foreign crime is equivalent to a New York felony the court must examine the elements of the foreign statute and compare them to an analogous Penal Law felony" (*People v Gonzalez*, 61 NY2d 586, 589 [1984]; *see also People v Muniz*, 74 NY2d 464, 467-468 [1989]). However, if the foreign statute "renders criminal not one act but several acts which, if committed in New York, would in some cases be felonies and in others would constitute only misdemeanors," the court may "go beyond the statue and scrutinize the [foreign] accusatory instrument" (*Gonzalez* at 590-591; *see also Muniz* at 468).

The Maryland statute under which defendant was convicted states:

> "Any person who shall without the color of right forcibly abduct, take or carry away any child under the age of twelve years from the home or usual place of abode of such child, or from the custody and control of the parent or parents, or lawful guardian or guardians of such child, or be accessory thereto, or who shall without such color of right and against the consent of the parent or parents or lawful guardian or guardians of such child, persuade or entice from the usual place

> of abode or house of such child, or from the custody and control of the parent or parents, or guardian or guardians of such child, or be accessory thereto, or shall knowingly secrete or harbor such child, or be accessory thereto, with the intent to deprive such parent or parents, guardian or guardians, or any person who may be in lawful possession of such child, of the custody, care and control of such child, shall be guilty of a felony, and upon conviction shall suffer imprisonment in the penitentiary for a term not exceeding twenty years in the discretion of the Court."

(Md. Ann. Code art 27, 92 repealed by Acts 2002, Ch. 26, §1, eff. Oct. 1, 2002)

By comparison, Penal Law § 135.20 states "[a] person is guilty of kidnapping in the second degree when he abducts another person." Penal Law § 135.00(2) defines "abduct" as "to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force."

Defendant's Maryland conviction easily qualifies as a New York felony. Maryland's former crime of abducting a child under 12 by forcibly taking a child from his or her home or parents is equivalent to the New York felony of second-degree kidnapping (*see People v Antonio*, 58 AD3d 515 [2009] [evidence was sufficient to support conviction for attempted second-degree kidnapping where defendant, in pursuit of frightened child, told bystander from whom child sought protection that he was child's father and reached out for her hand, evincing intent to restrain her]; *People v Cassano*, 254 AD2d 92, 93 [1998], *lv denied* 92 NY2d

1029 [1998] [defendant's actions in grabbing two-year-old child from custody of his uncle and walking swiftly into crowded street demonstrated intent to abduct victim sufficient for a conviction of attempted kidnapping in the second degree]).

To establish a predicate felony, Penal Law § 70.04 also requires that imposition of the sentence on the prior conviction be "not more than ten years before commission of the felony of which the defendant presently stands convicted." It further provides that in calculating the ten-year period "any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (Penal Law § 70.04[1][b][iv],[v]).

Defendant does not dispute that in fact his incarceration was long enough that the prior sentence was imposed within the ten-year limitation. Instead, he contends that the predicate violent felony statement the People filed was facially defective because the Maryland conviction the statement identifies occurred more than ten years before the present felony, and the statement does not set forth a term of incarceration that could be used to toll the ten-year limitation period. However, defendant failed to raise the claim that the predicate felony statement was

facially insufficient because it omitted tolling information at the time of his original predicate felony adjudication. Thus, this claim is unpreserved for review (*People v Ross*, 7 NY3d 905 [2006]; *People v Smith*, 73 NY2d 961 [1989]; *People v Bouyea*, 64 NY2d 1140 [1985]). Moreover, as the record reflects that defendant's period of incarceration related to the Maryland case satisfied the ten-year limitation period, any failure to list the tolling period on the predicate violent felony statement was harmless (*see Bouyea*, 64 NY2d at 1142).

As defendant's challenges to his sentencing as a second violent felony offender lack merit, his first counsel was not ineffective for failing to raise them.

We have considered defendant's remaining contentions and find them unavailing.

All concur except Buckley and McGuire, JJ. who concur in a separate memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring)

Defendant's challenges to his adjudication as a second violent felony offender on the basis of the Maryland conviction are not preserved for review due to his failure to controvert any of the allegations in the predicate violent felony offender statement filed by the People (CPL 400.15[3] ["Uncontroverted allegations in the statement shall be deemed to have been admitted by the defendant"]; *cf.* CPL 400.15[7][b] ["Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge"]). Moreover, as the majority correctly holds, defendant's claim that he need not preserve for review his claim that the Maryland conviction is not equivalent to a felony in New York is refuted by *People v Smith* (73 NY2d 961 [1989]). In *Smith*, the Court held that because the defendant failed timely to controvert the allegations of the predicate felony statement, "any question concerning whether defendant's prior conviction of kidnapping under 18 USC § 1201 is equivalent to his conviction of a felony in New York has not been preserved for our review" (*id.* at 963).

Nor are defendant's other challenges -- (1) that the Maryland conviction occurred more than 10 years before the present offense and the statement failed to allege any tolling

periods, and (2) that the statement miscited the Maryland statute -- preserved for review. In contrast to the sequentiality claim that the Court of Appeals held did not need to be preserved for review by timely objection (*People v Samms*, 95 NY2d 52 [2000]), the validity of these challenges cannot "be determined from the face of the appellate record" so that "[n]o resort to outside facts, documentation or foreign statutes is necessary" (*id.* at 57). Unlike the sequentiality challenge in *Samms*, in this case a lack of sentencing authority is not "manifest" "[w]hen the [predicate violent felony offender] statement is considered along with other information the court had before it" (*id.* at 58). Rather, defendant's challenges present "issues of [the] type [that] must be raised and explored at the trial court level, where a record is developed for appellate review" (*id.* at 57).

People v Ross (7 NY3d 905 [2006]) provides additional support for the People's position that defendant waived his claim that the second violent felony offender statement was defective because, contrary to the mandate of CPL 400.15(2), it did not "set forth ... the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation set forth in subparagraph (iv) of paragraph (b) of [Penal Law 70.04(1)]." In *Ross*, contrary to the statutory requirement that "a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged

predicate felony conviction" (CPL 400.21[2]), the People failed to file *any* predicate felony statement (7 NY3d at 906). At the plea proceeding, however, "defendant waived receipt of the statement, and, upon questioning by the judge, declined to contest his predicate felonies" (*id.*).

On these facts, the Court of Appeals held that "[b]ecause information before the sentencing court established that defendant had been convicted of a known and identified felony within the time required by the statute, his waiver of his rights to receive a predicate felony statement and to controvert its allegations (*see* CPL 400.21[2], [3]) was valid" (*id.*). Here, the People did file a second violent felony offender statement and defendant, "upon questioning by the judge, declined to contest" the allegation that he was a second violent felony offender. To be sure, defendant did not expressly state in haec verba that he was waiving any claim that the 10-year limitation period had not been satisfied. But the possible applicability of the limitation period not only was apparent from the face of the statement, but the court expressly raised the issue of the limitation period after defendant was arraigned on the statement. After conferring with counsel, defendant himself expressly declined to controvert the allegation that he was a second violent felony offender. Moreover, defendant's argument that the second violent felony offender statement is fatally defective because CPL 400.15(2)

states that the statement "shall" set forth the facts relating to any period of incarceration to be used for tolling purposes, proves too much. The same statute also states that "[u]ncontroverted allegations in the statement *shall* be deemed to have been admitted by the defendant" (CPL 400.15[3] [emphasis added]).[1]

The conclusion that defendant cannot obtain relief on the basis of these belated challenges (absent an exercise of our interest of justice jurisdiction), is supported as well by the core purposes of the contemporaneous-objection rule embodied in CPL 470.05(2) -- promoting finality and preventing gamesmanship and the waste of judicial resources through the requirement of a specific and timely objection (*see People v Lopez*, 71 NY2d 662, 665 [1988]; *People v Dekle*, 56 NY2d 835, 837 [1982])-- and a central purpose of plea bargaining -- to "mark[] the end of a

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[1]As the People argue, moreover, in *People v Sullivan* (153 AD2d 223, 231-233 [1990], *lv denied* 75 NY2d 925 [1990]), a panel of the Second Department held that by not controverting the allegations of the predicate felony statement, the defendant had failed to preserve his appellate claim that the statement was defective because it failed to set forth the information necessary to determine whether the 10-year limitation had been satisfied. In the cases cited by defendant in which this Court has discussed this limitation period, this Court did not address the issue of whether the defendant had waived his claim that the limitation period had not been satisfied (*see e.g. People v Ortiz*, 19 AD3d 281 [2005], *lv denied* 5 NY3d 808 [2005]; *People v Johnson*, 196 AD2d 408 [1993], *lv denied* 82 806 [1993]). *People v Mendoza* (207 AD2d 715 [1994]) and *People v Rodriguez* (191 AD2d 287 [1993], *lv denied* 81 NY2d 1019 [1993]), other cases cited by defendant, are not relevant as they involve sequentiality claims.

criminal case, not a gateway to further litigation" (*People v Taylor*, 65 NY2d 1, 5 [1985]). At the time of the guilty plea, when defendant was arraigned on and failed to controvert the allegations of the predicate violent felony offender statement, he had powerful incentives not to challenge the statement's allegations. Had he challenged them, he may have imperiled the plea bargain, thereby exposing himself to the risk of being convicted after trial of the top count of the indictment, a class B violent felony offense for which a maximum sentence of 25 years is authorized even if defendant is not a second violent felony offender (Penal Law § 70.02[3][a]).[2] Under these circumstances, it makes no sense to permit defendant to wait more than six months after sentencing to raise for the first time these challenges to his adjudication as a second violent felony offender. Regardless of whether the delay in this case would have prejudiced the People's ability to prosecute defendant, permitting a defendant to raise such challenges for the first time in a CPL 440.10 or a CPL 440.20 motion would prejudice the People in at least some cases. After all, no provision of CPL 440.10 or CPL 440.30 would require these challenges to be made within a particular time period or even that they be prosecuted diligently. Defendant could have raised these challenges when he

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[2]For this reason, I would not review defendant's challenges in the interest of justice.

was arraigned on the second violent felony offender statement, but failed both to do so and to offer good cause for that failure. Accordingly, we should give effect to the statutory directive that "[w]here a finding has been entered pursuant to this section, such finding shall be binding upon that defendant in *any* future proceeding in which the issue may arise" (CPL 400.15[8] [emphasis added]; *see generally People v Crippa*, 245 AD2d 811 [1997], *lv denied* 92 NY2d 850 [1998]; *People v Polowczyk*, 157 AD2d 865 [1990], *lv denied* 75 NY2d 922 [1990]).

In my view, because defendant has waived these claims that the sentence is illegal, i.e., his claims that he is not a second violent felony offender, he also has waived the claim that the plea was involuntary because of a "mistaken" belief that he was a second violent felony offender. If defendant's claims that he is not a second violent felony offender must be deemed meritless, his claim that he pleaded guilty because of a "mistaken" belief that he was such an offender also must be deemed meritless. In this regard, I agree with the majority that *People v Bennett* (60 AD3d 478 [2009]) is not to the contrary, as the People did not argue, either when the defendant moved to vacate the sentence or on appeal, that he had waived his claim that he was not a second felony offender. Rather, the People conceded that the defendant was improperly adjudicated a predicate felon.

Unlike the majority, I see no reason to reach the merits of

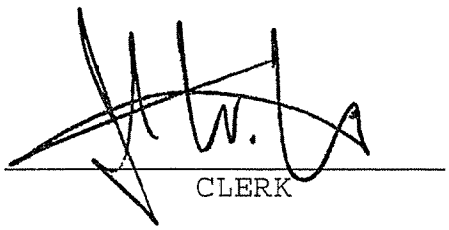
defendant's untimely challenges to his adjudication as a second violent felony offender. Defendant's failure to controvert the allegations of the statement is a sufficient ground for rejecting those challenges, and the important goals of finality, conservation of judicial resources and prevention of gamesmanship are furthered by not reviewing the merits.

Finally, defendant is not entitled to any relief on his claims that his counsel was ineffective because (1) she failed to challenge the allegation that he was a second violent felony offender, and (2) at a pretrial hearing, she "spoke out against defendant's pro se motion to have her relieved and effectively called him a liar" and later "announced that her client had threatened her and that communications had broken down." In his CPL 440.10 motion, defendant never raised either claim, and he thus "has failed to show 'the absence of strategic or other legitimate explanations' for the various aspects of counsel's conduct challenged on appeal (*People v Rivera*, 71 NY2d 705, 709 [1988])" (*People v Holman*, 14 AD3d 443, 443 [2005], *lv denied* 4 NY3d 887 [2005]). As noted above, with respect to the first of these claims of ineffective assistance of counsel, the existing record makes clear that counsel could have believed that it was not in defendant's best interest to challenge the allegation that he was a second violent felony offender as such a challenge might have jeopardized a favorable plea bargain. Moreover, the

existing record does not exclude the possibility that counsel discussed this very concern with defendant prior to or during the plea proceeding. Whether under different circumstances, such as when a defendant is pleading guilty to the top count of an indictment, the failure to controvert a predicate felony offender statement might support a claim of ineffective assistance of counsel, is a matter we need not address.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

841-
842 In re Tristram K.,

A Child Under the Age of
Eighteen Years, etc.,

Jing K.,
Respondent-Appellant,

Administration for Children's Services, etc.,
Petitioner-Respondent.

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L. M. X., et al.,
Intervenors-Petitioners.

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In re Tristram K., etc.,

Douglas K., et al.,
Petitioners-Respondents,

-against-

Jing K.,
Respondent-Appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Stephen T. Kaiser of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for Administration for Children's Services, respondent.

D. Philip Schiff, New York, for Douglas and Corinne K., respondents.

Tamara A. Steckler, New York (Judith Stern of counsel), Law Guardian.

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about April 14, 2008, which terminated the placement of the subject child with the Commissioner of Social

Services and discharged him to the custody of petitioners Douglas and Corrine K., and modified petitioner agency's permanency plan for the child so as to place him permanently with the K.s, unanimously affirmed, without costs. Order, same court and Justice, entered on or about April 14, 2008, which awarded custody of the child to Douglas and Corrine K., unanimously affirmed, without costs.

Respondent mother abandoned the issue of neglect by choosing not to challenge the finding of neglect brought up for review by her appeal from the prior dispositional order (*see* CPLR 5501[a][1]; *Matter of Breeyanna S.*, 52 AD3d 342 [2008], *lv denied* 11 NY3d 711 [2008]).

The record reveals the presence of extraordinary circumstances that warrant depriving respondent of the custody of her child and demonstrates that the best interests of the child will be served by awarding custody to Douglas and Corrine K., the child's uncle and aunt (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). The events leading to respondent's long separation from the child were set in motion by respondent's absconding to China with the child during an unsupervised visit. During this separation, the child bonded with his uncle and aunt, who have provided him with a stable, loving, and supportive home, in which he has thrived.

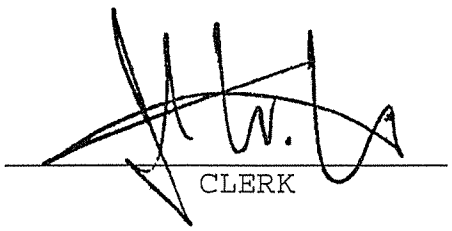
This determination is without prejudice to Family Court's

consideration of the issue of visitation (*see Matter of Tristam K.*, 2006 NY App Div LEXIS 10166 [2006]; *Matter of Tristam K.*, 25 AD3d 222, 227-228 [2005]; *Matter of Tristam K.*, Fam Ct, NY County, April 14, 2008, Schechter, J., Docket No. V14734/06). Indeed, the court stated that the subject of visitation may be addressed again when the custody issue has been settled. In the interim, the court advised communication by mail, e-mail, photographs and video and audio recordings to preserve "a realistic picture" of respondent in the child's mind and to prepare for the time when there may again be direct visitation between them.

We have considered respondent's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Andrias, J.P., Catterson, Renwick, Freedman, JJ.

844 Jeannette McGough, et al., Index 116639/06
Plaintiffs-Respondents,

-against-

Alfred Leslie,
Defendant-Appellant,

Anthony Leslie,
Defendant.

Shatzkin & Mayer, P.C., New York (Karen Shatzkin of counsel), for appellant.

Law Office of Mark D. Speed, New York (Mark D. Speed of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered February 3, 2009, which, to the extent appealed from, denied the motion by defendant Alfred Leslie for summary judgment dismissing the complaint as against him as time-barred and granted plaintiffs' cross motion declaring that they are entitled to immediate possession of the artworks gifted to them, unanimously reversed, on the law, without costs, defendant Leslie's motion granted and plaintiffs' cross motion denied. The Clerk is directed to enter judgment accordingly.

Plaintiffs, the children of defendant Alfred Leslie, an artist, asserting claims for conversion and replevin, commenced this action to compel their father to relinquish artworks previously gifted to them, or the value thereof.

The record in the instant case clearly establishes that

plaintiffs' claims sound in simple conversion rather than replevin. Plaintiffs rely on the Court of Appeals decision in *Solomon R. Guggenheim Found. v Lubell* (77 NY2d 311 [1991]) for the proposition that the possessor must refuse to return the chattel. Furthermore, plaintiffs assert that the possessor must have "actually denied [plaintiffs'] ownership rights . . ."

Unfortunately for this contention, the *Lubell* Court was confronted with an action in replevin to recover stolen property rather than a claim for conversion. Although both claims are governed by the same statute of limitations of three years (CPLR 214[3]), "[t]he rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it" (77 NY2d at 317-318). The *Lubell* Court characterized this "demand and refusal rule" as the "rule that affords the most protection to the true owners of stolen property" (*id.* at 318; *see also Close-Barzin v Christie's, Inc.*, 51 AD3d 444 [2008]; *Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 34 [2006], *lv denied* 8 NY3d 809 [2007] [demand upon, and refusal of, a person in possession of a chattel to return it are essential elements of a cause of action in replevin]).

The Court of Appeals specifically addressed the question of accrual of a claim sounding in conversion in *State of New York v*

Seventh Regiment Fund (98 NY2d 249 [2002]). In *Seventh Regiment Fund*, the Court reaffirmed the extensive precedent in this state that there is difference in accrual between simple conversion and replevin of stolen property. In reinforcing this difference, the Court stated, "Some affirmative act - asportation by the defendant or another person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant - has always been an element of conversion" (98 NY2d at 260).

The *Seventh Regiment Fund* Court reversed this Court, remitted the case to Supreme Court, and held that:

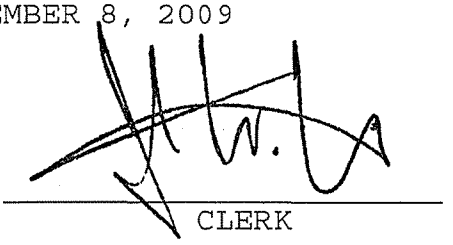
> "Supreme Court must determine upon remittal whether the Fund was a bona fide purchaser. If so, the State's claim will have accrued only after demand and refusal. If not, or if demand would have been futile, the claim will have accrued when the Fund actually interfered with the State's property" (98 NY2d at 261).

Moreover, as early as 1991 defendant "interfered with" plaintiffs' property when, despite entreaties by plaintiffs and defendant's ex-wife, defendant retained possession of the property. The record is replete with instances of similar

interferences over the years. Thus, plaintiffs' claims in conversion are time-barred by more than a decade and must be dismissed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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Andrias, J.P., Catterson, Renwick, DeGrasse, Freedman, JJ.

856 Becir Paljevic, Index 106625/02
Plaintiff-Respondent,

-against-

998 Fifth Avenue Corp., et al.,
Defendants-Appellants,

LICO Construction Co.,
Defendant-Respondent,

"Jane" Stanton,
Defendant.

MacKay, Wrynn & Brady, LLP, Douglaston (Dennis J. Brady of counsel), for 998 Fifth Avenue Corp. and Robert Stanton, appellants.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for Mark Hampton, Inc., appellant.

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for Becir Paljevic, respondent.

Hoffman & Roth, LLP, New York (Jayne F. Monahan of counsel), for LICO Construction Co., respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 21, 2008, which, inter alia, granted the motion of defendant LICO Construction Co. for summary judgment dismissing the complaint and all cross claims as against it, denied defendant Mark Hampton, Inc.'s motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 200 and 240(1) and common-law negligence, and partially denied the cross motion of defendants Stanton and 998 Fifth Avenue Corp. (998) for summary judgment, unanimously modified, on the law, to deny

LICO's motion for summary judgment, and the complaint, with the exception of the Labor Law § 241 (6) cause of action, and cross claims asserted against LICO reinstated and otherwise affirmed, without costs.

LICO was the contractor of the subject renovation of a 17-room apartment. LICO's written contract required it to provide full-time site supervision and maintain protection throughout the project. Although extensive, the work encompassed by LICO's contract excluded painting. Plaintiff, a painter employed by nonparty Pat Cutaneo, Inc., was injured in a fall from an A-frame ladder while he was painting the kitchen. Cutaneo had been engaged pursuant to a subcontract with Hampton. Plaintiff testified that on the day of the accident he had been working in the livingroom when directed by LICO to work in the kitchen. In fact, LICO's foreman testified that it was his company that coordinated the various trades at the project. In granting LICO's motion, Supreme Court concluded that LICO bore no liability as a contractor under Labor Law § 240(1) because it did not supervise or control plaintiff's work. The court based its conclusion on the exclusion of painting from the work required under LICO's contract. However, Paragraph 10.1.1 of LICO's contract requires it to maintain and supervise all safety precautions and programs in connection with its performance of the contract. Moreover, Paragraph 10.2.1 requires LICO to

provide reasonable protection to prevent injury to "employees on the Work *and other persons who may be affected thereby* [emphasis added]." Accordingly, LICO contractually assumed responsibility for plaintiff's workplace safety despite the fact that his task of painting was excluded from LICO's contract. Whether LICO is labeled a general or prime contractor is not necessarily determinative. Triable issues of fact as to LICO's statutory liability are raised by the absence of a general contractor, LICO's contractual assumption of responsibility for site safety and its coordination of the trades at the project (*cf. Bagshaw v Network Serv. Mgt.*, 4 AD3d 831, 833 [2004]).

The court properly determined that there were triable issues of fact as to whether Hampton was potentially liable to plaintiff under Labor Law §§ 200 and 240(1) and common-law negligence as the owners' agent in light of its agreement to supervise the project and to oversee the painting and decorating activity (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [2007]). Since such liability would also extend to the cross claims of 998 and Stanton for common-law indemnification (*see e.g. Kennelty v Darlind Constr.*, 260 AD2d 443, 445-446 [1999]), the court properly determined that the disposition of those claims must await a jury's determination.

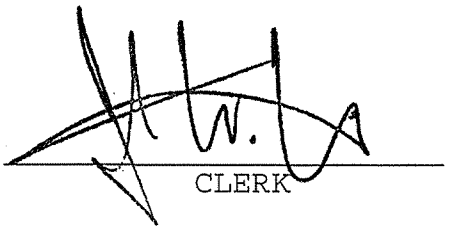
Furthermore, the court properly declined to consider those

portions of 998 and Stanton's untimely cross motion which did not relate to the foregoing motions (*cf. Rosa v Macy Co.*, 272 AD2d 87 [2000]).

We have considered the parties' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Karla Moskowitz
Dianne T. Renwick, JJ.

5092
Index 113486/04

x

James Sykes, et al.,
Plaintiffs-Respondents,

-against-

RFD Third Avenue 1 Associates, LLC,
et al.,
Defendants,

Cosentini Associates, LLP,
Defendant-Appellant.

x

Defendant Cosentini Associates, LLP, appeals from an order of the Supreme Court, New York County (Richard F. Braun, J.), entered October 9, 2007, which, insofar as appealed from as limited by the brief, denied its motion to dismiss the negligent misrepresentation claim.

Wilson, Elser, Moskowitz, Edelman & Dicker, New York (Richard E. Lerner of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (John M. Desiderio and Jessica D. Scherer of counsel), for respondents.

MOSKOWITZ, J.

The only issue on this appeal is whether plaintiffs have stated a claim for negligent misrepresentation. We hold they have not, because they have failed to allege a relationship between themselves and this defendant, the mechanical engineer for the building where plaintiffs purchased an apartment, that is close enough to approach privity. In particular, plaintiffs have failed to allege that they were known to defendant at the time of the alleged misrepresentation and have failed to allege some conduct on the part of defendant linking it to plaintiffs. Therefore, we reverse the order of the motion court.

RFD Third Avenue 1 Associates, LLC (sponsor) retained defendant Cosentini Associates LLP (Cosentini or defendant) in an Engineering Services Agreement, dated October 6, 1997, to prepare certain designs for the construction phase of The Empire Condominium in Manhattan. Under the agreement, Cosentini's responsibilities included the mechanical design of the heating, ventilation and air conditioning (HVAC) systems. In addition, the agreement provided that Cosentini would sign off on the work performed and issue certifications that regulatory authorities required. However, defendant did not install or oversee the installation of the HVAC units. Nor did defendant prepare the condominium offering plan or the documents the offering plan

contained. However, defendant admits that it provided the sponsor with information regarding the mechanical systems for the building for use in the offering plan. The offering plan appears to be dated April 27, 1999. Presumably, sometime before that point, defendant supplied the information for use in the offering plan. Cosentini claims it completed all its work on or about May 21, 2001 and did not perform additional work after that.

In July 2000, plaintiffs James and Ellen Sykes entered into a contract to purchase a penthouse apartment from the sponsor. The closing took place on March 13, 2001. Plaintiffs moved into the apartment in April 2001.

According to the complaint before the court, problems with the apartment became evident shortly after plaintiffs took occupancy. This included problems with the HVAC system. Plaintiffs were unable to maintain a comfortable temperature in the apartment in winter or summer regardless of the thermostat setting.

After their situation went unresolved, plaintiffs filed a seven-count complaint in September 2004 against Cosentini and other defendants, including the sponsor. The only claim plaintiffs asserted against Cosentini was for "common Law Fraud and misrepresentation."

In December 2004, Cosentini moved to dismiss that complaint

for failure to state a cause of action for fraud or negligent misrepresentation. The court granted Cosentini's motion, dismissing the complaint as to Cosentini without prejudice because plaintiffs' allegations were conclusory and failed to allege that Cosentini was in privity of contract with them or in "a relationship so close as to approach that of privity."

In March 2006, plaintiffs filed a separate action against Cosentini, alleging breach of contract (based on the theory that plaintiffs were intended beneficiaries under the Engineering Services Agreement), professional malpractice and "Common Law Fraud and/or Negligent Misrepresentation." Their cause of action for negligent misrepresentation, although combined with their fraud claim, relied only upon the offering plan and related marketing materials. Plaintiffs alleged that the offering plan and marketing documents promised "[f]unctioning heating, ventilation and air conditioning systems meeting applicable governmental requirements for comfort and efficiency." Plaintiffs claim that, contrary to the representations in the offering plan, the HVAC system did not meet applicable governmental requirements and that they were unable to maintain a comfortable temperature in the apartment. Plaintiffs also point out that the offering plan identified defendant as the mechanical engineer for the construction phase of the building and touted

defendant's services to other buildings in Manhattan. Plaintiffs claim that "prospective purchasers (including [plaintiffs]) were expected to and would rely upon Cosentini's reputation and expertise, as summarized in the Offering Plan." Defendant has admitted that "[a]s the mechanical engineer for the project, Cosentini provided a description of the mechanical systems to the architect and RFD for use in the offering plan." Cosentini had no involvement in the preparation or distribution of the offering plan, certifications or marketing materials. It is undisputed that Cosentini never communicated or interacted with plaintiffs prior to their purchase of the apartment.

Defendant moved to dismiss the entire complaint as against it. The motion court deemed plaintiffs' cause of action for breach of contract to be a claim for professional malpractice and then dismissed professional malpractice as time-barred. The court dismissed the fraud claim as conclusory. However, the court did not dismiss that part of plaintiffs' third cause of action for negligent misrepresentation. Only defendant appealed. Plaintiffs did not appeal the dismissal of their breach of contract and professional malpractice claims.

Plaintiffs' negligent misrepresentation claim fails to allege a "special relationship," i.e., "a relationship so close

as to approach that of privity" (*Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 [2000]). The New York Court of Appeals takes a rather cautious approach to determining whether a relationship necessary to support a claim for negligent misrepresentation exists (see *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 [1989] ["[w]e have defined this duty narrowly, more narrowly than other jurisdictions"]). This narrow approach developed out of concern for the "limitless liability" that could result that otherwise would stop with the contracting parties (*Parrott* at 483 citing *Prudential Ins. Co., v Dewey Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]; *see also Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 553 [1985] [explicitly rejecting a rule "permitting recovery by any foreseeable plaintiff"]; *Ossining*, 73 NY2d at 421 ["[i]n negligent misrepresentation cases especially, what is objectively foreseeable injury may be vast and unbounded, wholly disproportionate to a defendant's undertaking or wrongdoing"]).

Therefore, before a stranger to a contract can claim harm from negligent misrepresentation, there must be: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and

evincing its understanding of that reliance" (*Parrott*, 95 NY2d at 484 [citations omitted]; *see also Securities Investor Protection Corp. v BDO Seidman*, 95 NY2d 702, 712 [2001] [no privity between SIPC and accountants where accountants had not prepared audit reports for the specific benefit of SIPC, did not send them to SIPC and SIPC never read these reports]).

Accordingly, we have been circumspect when assessing privity (*see e.g. Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 94-95 [2003] [accountant's audit "was a task performed pursuant to professional standards applicable in the context of any audit, and was not undertaken pursuant to any duty owed toward [plaintiff]"); *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 107-108 [2001] no privity between lender and borrower's accountants where only contact was single phone call]; *see also Israel Discount Bank of N.Y. v Miller, Ellin & Co.*, 277 AD2d 58, 59 [2000]).

"Although this rule first developed in the context of accountant liability, it has applied equally in cases involving other professions" (*Parrott*, 95 NY2d at 483; see also *Ossining* at 424 ["[n]or does the rule apply only to accountants"]). This Court too has extended the privity requirements of *Parrott* beyond

the accountant arena (*see e.g. Bri-Den Constr. Co., Inc. v Kappell & Kostow Architects P.C.*, 56 AD3d 355 [2008], *lv denied* 12 NY3d 703 [2009] [no privity between architect and bidder]); *Point O'Woods Assn. v Those Underwriters at Lloyd's, London subscribing to Certificate No. 6771*, 288 AD2d 78, 79 [2001], lv denied 98 NY2d 611 [2002] [no privity between insurance carrier and broker]).

Notably, plaintiffs do not argue on this appeal that the Engineering Services Agreement between defendant and RFD demonstrates defendant knew potential tenants would rely on the information defendant provided. Rather, to support its argument that privity exists, plaintiffs point to allegations that rely solely on the offering plan. Plaintiffs' entire argument rests on the theory that: (1) because defendant supplied information about certain mechanics of the building, including the HVAC system, to the sponsor and the architect for use in the offering plan; and (2) because the offering plan mentions defendant as the mechanical engineering firm retained to prepare mechanical designs for the building, this somehow leaves defendant open to liability for negligent misrepresentation.

The alleged relationship between plaintiffs and this defendant is too attenuated to support a relationship approaching privity. As we explained earlier, a relationship approaching

privity requires that: (1) defendant have an awareness that his or her statement is for a particular purpose; (2) a known party relies on the statement in furtherance of that purpose; and (3) there is some conduct linking defendant to the relying party and evincing its understanding of that reliance. While arguably the allegations in the complaint satisfy the first prong, plaintiffs have not made allegations sufficient to satisfy the other requirements.

The second prong requires reliance by a "known party." Plaintiffs completely failed to allege plaintiffs were "known" to defendant at the time of the alleged misrepresentation. Indeed, at the time it submitted information to the sponsor about the HVAC systems for use in the offering plan (sometime prior to April 27, 1999), defendant would only have been aware in the most general way that some buyer would rely on that information to purchase a particular unit. This is clearly insufficient (*see Bri-Den Constr. Co.*, 56 AD3d at 355 [2008] ["prequalified bidders were simply not 'known' at the time of the complained-of conduct"]; *Ford v Sivilli*, 2 AD3d 773, 774-775 [2d Dept 2003] [in case alleging negligent misrepresentation for submitting incorrect plans to town, plaintiff real estate purchasers could not sue architect and expediter, that *sellers* had hired, because "[a]t best, the plaintiffs were part of an 'indeterminate class

of persons who, presently, or in the future' may rely upon [the architect's and expediter's] alleged misrepresentations, which are not the equivalent of known parties"]; *see also Credit Alliance Corp.*, 65 NY2d at 553 n 11 [rejecting rule that defendant, without more, could be liable to class of foreseeable plaintiffs]; *Westpac Banking Corp. v Deschamps*, 66 NY2d 16, 19 [1985] [although defendant may have known that the financial statements it prepared were for the particular purpose of obtaining a bridge loan, the complaint failed to state a relationship approaching privity where it did not claim that defendant knew that client was showing its reports to plaintiff, rather than a class of "potential bridge lenders"]).

Even if plaintiffs were a "known party," the complaint remains insufficient because plaintiffs have failed to allege linking conduct. Plaintiffs have not alleged, or even argued, that anything in the Engineering Services Agreement provides the necessary link to defendant. Plaintiffs do not allege that defendant had agreed to provide plaintiffs directly with information or point to any direct contact between the parties whatsoever (*see Westpac*, 66 NY2d at 19 [no privity where there were no allegations that defendant had any dealings with plaintiff, had specifically agreed to prepare report for plaintiff's use or had even agreed to provide plaintiff with a

copy]; *compare Ossining*, 73 NY2d at 425 [finding privity where "defendants allegedly undertook their work in the knowledge that it was for [plaintiff] alone" and had "various types of contact directly with [plaintiff]").

The dissent claims that the complaint is sufficient because: (1) Cosentini conceded that it provided a description of the HVAC systems for use in the offering plan; and (2) the offering plan, "based upon representations clearly made by Cosentini to the sponsor," states particulars about the HVAC system, including that the system "will be designed to maintain a temperature of 72[degrees]F." This argument would be more persuasive if the *complaint* actually said what the dissent has written. It doesn't. We must judge the complaint as plaintiffs have drafted it, not as the dissent would draft it for them. Nor does the complaint delineate what conduct links defendant to plaintiffs. As stated earlier, it is not enough that future purchasers were expected to rely on the offering plan (*see Bri-Den Constr. Co.*, 56 AD3d at 355).

The cases plaintiffs cite, *Board of Mgrs. of Alfred Condominium v Carol Mgt.* (214 AD2d 380 [1995], *lv dismissed* 87 NY2d 942 [1996]) and *Board of Mgrs. of Astor Terrace Condominium v Shuman, Lichtenstein, Claman & Efron*, (183 AD2d 488 [1992]), both of which predate *Parrott*, are inapposite because in those

cases the plaintiff unit owners were intended third party beneficiaries of the contract between the sponsor and the engineers or design professionals. On this appeal, plaintiffs point to no language indicating that the sponsor and defendant agreed to confer third party beneficiary status on plaintiffs or that the sponsor intended that result. The dissent argues that this is an irrelevant distinction because plaintiffs are not asserting breach of contract. This position overlooks negligent misrepresentation's "known party" requirement that third-party beneficiary status might satisfy. However, plaintiffs have not argued that third party beneficiary status makes them a known party to defendant and we decline to make that argument for them.

We reject the dissent's admonishment that we must follow *Astor's* holding on negligent misrepresentation just because it is the law of this Court. *Astor* is in direct conflict with Court of Appeals precedent from *Credit Alliance* through *Parrott*. Indeed, the Court of Appeals has indirectly rejected *Astor's* holding, at least concerning privity as it relates to negligent misrepresentation. The Court of Appeals in *Parrott* affirmed a majority decision of this Court (*see* 263 AD2d 316). The majority granted summary judgment to defendant accounting firm primarily because there was no evidence of conduct linking the plaintiff to the accountants. This dismissal occurred in the face of a

lengthy dissent that relied heavily upon *Astor*. Thus, it is questionable whether *Astor* is good law on this issue. Moreover, to follow *Astor* in the face of Court of Appeals precedent like *Parrott* creates special protection for accountants when the Court of Appeals has dictated that the rule applies equally to other professions (*see Ossining*, 73 NY2d at 424).

The dissent assumes that because this Court cited *Astor* in *Castle Vill. Owners Corp. v Greater NY Mut. Ins. Co.* (58 AD3d 178 [2008]), *Astor* remains good law to support plaintiff's claim for negligent misrepresentation. This assumption is misplaced. *Castle Village* cited *Astor* only for its discussion of third-party beneficiary status, a completely different point. Again, plaintiffs here do not argue on appeal that they are intended beneficiaries under defendant's contract with the sponsor.[1]

Moreover, *Castle Village* is so different from this case that its reliance on *Astor* says very little. The claim in *Castle Village* was for professional malpractice, rather than negligent misrepresentation, and involved the issue of whether the

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[1] Indeed, the dissent fails to distinguish *Bri-Den Constr. Co.*, a far more recent case than *Astor*, in which this Court upheld the dismissal of a complaint against a construction project's architect because plaintiff was not a known party at the time of the misconduct, and otherwise fails to explain how plaintiffs were "known parties" rather than a class of potential parties within the parameters of New York law as the Court of Appeals has articulated it for us.

defendant could recover in contribution from another defendant in a third-party action. In that case, the engineer knew its work was critical to approval of a conversion plan, the engineer's report was included in the offering plan, the engineer continued to inspect the site after Castle Village became the owner and Castle Village was an intended beneficiary of the contract between the engineer and the sponsor.

In contrast, here, none of these circumstances are present. Plaintiffs' claim is for negligent misrepresentation and relies solely on defendant's supplying information to the sponsor or architect for use in the offering plan. Plaintiffs do not even argue on appeal that they are intended beneficiaries under defendant's contract with the sponsor. The offering plan did not include a report from defendant. Defendants supplied information for use in the offering plan, dated April 27, 1999, well before plaintiffs signed a contract in July 2000 and became owners on March 13, 2001.

In addition, the dissent's heavy reliance on *Ossining* is misplaced. In *Ossining*, as the dissent notes, there was direct contact between the plaintiff and the defendants. The Court of Appeals emphasized this factor to hold that plaintiff had stated a claim for negligent misrepresentation. Here, there are no allegations of direct contact. Therefore it is difficult to

discern how *Ossining* supports the dissent's position.

The dissent appears to endorse the approach set forth in section 552 of the Restatement (2d) of Torts. That section extends the liability of professionals who supply information for the guidance of others to loss a class of generally intended recipients might suffer where the professional is aware there is a possibility those recipients might rely on his or her work. However, the Court of Appeals has expressly rejected this approach (*see Credit Alliance Corp.*, 65 NY2d at 553 n 11; *Westpac Banking Corp.*, 66 NY2d at 19). The law the Court of Appeals has articulated for the State of New York is far more circumscribed. That is the law we must follow and thus, plaintiffs' claim for negligent misrepresentation against defendant Cosentini does not survive.

Accordingly, the order of the Supreme Court, New York County (Richard F. Braun, J.), entered October 9, 2007, that, insofar as appealed from as limited by the brief, denied defendant Cosentini Associates, LLP's motion to dismiss the negligent misrepresentation claim, should be reversed, on the law, with costs, the motion granted and the cause of action for negligent misrepresentation dismissed.

All concur except Tom, J.P. and Andrias, J.
who dissent in an Opinion by Andrias, J.

ANDRIAS, J. (dissenting)

Because of the majority's misplaced reliance upon *Parrott v Coopers & Lybrand* (95 NY2d 479, 483 [2000]), a case not cited by either party, in order to justify its reversal in this case and its rejection of our decision in *Board of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron* (183 AD2d 488, 489 [1992]), which it erroneously claims "is in direct conflict with more recent Court of Appeals precedent," namely *Parrott*, I dissent and would affirm the denial of defendant Cosentini Associates's motion to dismiss the negligent misrepresentation claim against it.

In this appeal in which the only remaining issue is a cause of action brought by the purchasers of a $4 million condominium penthouse atop the Empire Condominium on East 78th Street against Cosentini Associates, the mechanical engineering firm that designed the HVAC systems for the building, we all agree that plaintiffs' negligent representation claim is not duplicative of their professional malpractice claim (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1998]), and therefore is not barred by the statute of limitations applicable to professional malpractice claims. We differ, however, as to whether that cause of action can withstand Cosentini's motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

In order to state a cause of action for negligent misrepresentation, plaintiffs must allege awareness by Cosentini that the allegedly negligent misrepresentations were to be used for a particular purpose, reliance by a known party or parties in furtherance of that purpose and some conduct by Cosentini linking it to the party or parties and evincing its understanding of their reliance (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989], citing *Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536, 551 [1985]).

For present purposes, the facts asserted in plaintiffs' submissions in opposition to Cosentini's motion satisfy those prerequisites. Plaintiffs' allegations of a "special relationship" with Cosentini, i.e., "a relationship so close as to approach that of privity," are sufficient to state a cause of action for negligent misrepresentation (*Board of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488, 489 [1992] [internal quotation marks and citation omitted]). Cosentini admittedly provided the sponsor of the building in which plaintiffs purchased an apartment with descriptions of the heating, ventilation and air conditioning systems for use in the offering plan. Plaintiffs allege that Cosentini knew the representations in the offering plan would be relied on by purchasers such as they, that they purchased the

apartment pursuant to the offering plan, and that they relied on those representations in deciding to purchase the apartment.

The majority dismisses plaintiffs' allegations regarding Cosentini as "too conclusory since they fail to cite to a single specific statement Cosentini made that they relied upon in any fashion." However, in support of its motion to dismiss, Cosentini concedes that it provided a description of the building's mechanical systems, specifically the heating and air conditioning systems, to the building's architect and sponsor "for use in the Offering Plan." That offering plan, based upon representations clearly made by Cosentini to the sponsor, states, in pertinent part, that "the heating system will be designed to maintain a temperature of 72[degrees]F inside when the outside temperature is +15[degrees]F" and "[t]he apartments will be provided with individual water source heat pump units in each room, capable of maintaining inside conditions of 78[degrees]F and 60% humidity when outside temperatures are 89[degrees] F.F.W.B."

The motion court found that paragraphs 81-98 of the amended complaint state a cause of action for negligent misrepresentation. Those paragraphs allege in pertinent part, that the sponsor and Cosentini through "reckless and/or negligent" oversight made specific representations in the

offering plan, certification and related marketing materials concerning the "adequacy of the heating and air conditioning systems"; that Cosentini intended that those representations be relied on by purchasers of units in the building such as plaintiffs; that plaintiffs relied on representations, made either directly or indirectly to them, that the construction work had been done in a good and workmanlike manner in conformance with the plans as filed; and that plaintiffs relied upon the false and misleading representations in spending more than $4 million to purchase their unit.

In addition, the complaint alleges that both the sponsor and Cosentini understood that prospective purchasers such as plaintiffs were expected to and would rely upon Cosentini's reputation and expertise as summarized in the offering plan, etc.; that plaintiffs relied upon the offering plan and marketing materials; that based on such reliance they bought their penthouse unit; that the selling agent represented that the contractors and workers "were of the best quality"; that the HVAC system was improperly sized and plaintiffs were unable to maintain temperatures in their unit as specified in the offering plan; and that plaintiffs were justified in their reliance on the representations that Cosentini would perform its work in a good and workmanlike manner.

Plaintiffs also argued in opposition to Cosentini's motion that Cosentini entered into its contract with the sponsor with full knowledge that its HVAC design would be used in a luxury high-rise building for condominiums that would be sold to people like plaintiffs; that it admitted that it provided descriptions of the HVAC system to be used in the offering plan; and that the offering plan was incorporated by reference in plaintiff's purchase agreement.

The majority's attempt to distinguish *Astor Terrace* is unpersuasive. Like the offering plan in *Astor Terrace*, which claimed that the architects and engineers in that case were the "best," the offering plan in this case, in addition to touting its architect as "the architect of many of Manhattan's most famous buildings [naming the Knickerbocker condominium on East 72nd Street, the Siena condominium on East 76th Street, and Metropolitan Tower on West 57th Street]", describes Cosentini as having provided mechanical engineering for the ATT World Headquarters on 57th Street and Madison Avenue, and the Lever House at 390 Park Avenue. The offering plan also states that the plans and specifications had been prepared by such architects and engineers and that construction of the building, "including the individual Units and Common Elements," would be completed substantially in accordance with such plans and specifications.

Moreover, any reliance by the majority upon *Parrott* for a reversal in this case and its claim that *Parrott* indirectly rejected our decision in *Astor Terrace*, which they claim "is in direct conflict with more recent Court of Appeals precedent," is sadly misplaced. Significantly, as the Court stated in *Parrott*, it was not making new law, but merely reiterating what it had previously held time and time again, that is, in order to recover for pecuniary loss caused by negligent misrepresentation "there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (*id.*, quoting *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992], which cited *Ossining Union Free School Dist.*, 73 NY2d at 424 [1989] and *Credit Alliance Corp.*, 65 NY2d 536, the same two cases cited by this Court in *Astor Terrace*).

In *Astor Terrace*, this Court held that "'recovery may be had for pecuniary loss arising from negligent representations where there is actual privity of contract between the parties *or a relationship* so close as to approach that of privity' (*Ossining Union Free School Dist.*, 73 NY2d at 424)" (183 AD2d at 489) (emphasis added). We held that "[l]iability in a relationship approaching privity depends on a showing that the defendants were aware that reports were to be used for a particular purpose,

reliance by known parties in furtherance of that purpose, and some conduct by the defendants linking them to those parties and evincing an understanding of their reliance" (*id.*, citing *Credit Alliance Corp.*, 65 NY2d at 551).

The plaintiffs in *Astor Terrace* "met these criteria by showing that the design and engineering defendants *must have been aware* that the substance of their reports would be distributed to and relied upon by prospective purchasers, that such reliance did occur, and that the conduct of such defendants sufficiently linked them to plaintiff and evinced their understanding of the unit purchasers' reliance" (*id.*). "Of particular importance," this Court found, was "the fact that the units were marketed as luxury condominiums with an emphasis on the fact that the sponsor had gathered the best engineers and architects to design and construct the building and provide for its amenities" (*id.* at 489-490).

The majority claims that *Ossining Union Free School District* is somehow distinguishable because in that case there was "direct contact" between the plaintiff and the defendants and the Court of Appeals emphasized that factor in holding that plaintiff had stated a claim for negligent misrepresentation. However, there is nothing in the Court's opinion that indicates that "direct contact" was "emphasized" or weighed heavily in that holding.

Direct contact was just one of several factors the Court considered in determining that the plaintiff had sufficiently alleged that "defendants were aware - indeed, could not possibly have failed to be aware - that the substance of the reports they furnished would be transmitted to and relied upon by" the plaintiff (*Ossining Union Free School Dist.*, 73 NY2d at 425).

That litigation arose from certain reports made by several engineers following tests done to determine the structural soundness of a high school annex. The school district had retained an engineering consultant which in turn hired two engineering firms to conduct the tests. Both engineers reported serious weaknesses in the concrete slabs that formed the building's superstructure and the consultant informed the school district of those findings. After arranging for the use of other facilities at substantial expense, the school district hired a third independent expert who advised it that the previous conclusions of structural problems were based on faulty assumptions as to the type of concrete used. The school district then sued the two engineers for negligence and malpractice, alleging that the two engineers knew that the school district would rely upon their reports in order to determine what measures should be taken to deal with the structural "problems." The two engineers' CPLR 3211 motion to dismiss the complaint was granted

and the Second Department affirmed, citing the "long-standing rule that recovery will not be granted to a third person for pecuniary loss arising from the negligent representations of a professional with whom he or she has had no contractual relationship" (*id.* at 421).

In reversing and reinstating the cause of action for negligent misrepresentation, a unanimous Court of Appeals (per Kaye, J.) recited the history of the courts' long struggle to define the ambit of duty or limits of liability for negligence, which in theory could be endless, the rhetoric of which was couched in the concept of foreseeability. Since, in negligent misrepresentation cases, what is objectively foreseeable injury may be vast and unbounded and wholly disproportionate to a defendant's undertaking or wrongdoing, courts, in reaching the policy judgment called "duty," have invoked a concept of privity of contract as a means of fixing fair, manageable bounds of liability (*id.*). The Court then traced the history of the concept through *Ultramares v Touche* (255 NY 170 [1931] [per Cardozo, Ch. J.]) and up to *Credit Alliance Corp.*, in which the Court (per Jasen, J.) first spelled out the three-pronged criteria for liability.

As previously noted, the Court found that the school district had satisfied those prerequisites by alleging "that

through direct contact with defendants, information transmitted by Anderson [the consultant], and the nature of the work, defendants were aware - indeed, could not possibly have failed to be aware - that the substance of the reports they furnished would be transmitted to and relied on by the school district . . . in [the] ongoing project" (*id.* at 425). The Court concluded that "[n]ot unlike the bean counters in *Glanzer* [*Glanzer v Shepard*, 233 NY 236 (1922)], defendants allegedly rendered their reports with the objective of thereby shaping this plaintiff's conduct, and thus they owed a duty of diligence established in our law at least since *Glanzer* not only to Anderson [the consultant] who ordered also but to the school district who relied" (*id.* at 426).

Clearly, as the Court of Appeals found in *Ossining Union Free School District* and as we found in an identical situation in *Astor Terrace*, Cosentini, as evidenced by its concession that its descriptions of the HVAC systems it designed for the Empire Condominium were to be used in the sponsor's offering statement, "must have been aware that the substance of [its information] would be distributed to and relied upon by prospective purchasers" (183 AD2d at 489). As we further stated: "[a]s design and construction failures affect a condominium unit owner's standards of living and ability to sell, '[i]t cannot be heard that these condominium owners . . . were merely an

incidental rather than an intended beneficiary of the contracts'" (*id.*) (internal citation omitted). In other words, if plaintiffs, as prospective purchasers of a condominium unit that was not yet completed, were not expected or intended to rely upon Cosentini's representations regarding the heating, ventilation and air conditioning systems, which concededly were provided to the building's sponsor for use in the offering plan, who was?

Obviously, since we are only at the pleading stage, discovery will or will not flesh out the allegations in the complaint; however, based upon the controlling case law and the specific allegations in the complaint, it cannot be said as a matter of law that plaintiffs have not sufficiently pleaded a cause of action for negligent misrepresentation.

To the extent that the majority feels that *Parrott* has indirectly rejected our holding in *Astor Terrace*, such conclusion is unpersuasive. *Parrott* involved a dispute over the fair market value of shares in a small privately held corporation. This Court dismissed a negligence claim brought by a former director, vice president and minority shareholder against an accounting firm retained by the corporation to periodically value the company on a minority interest basis in connection with the sale or proposed sale of the corporation. At the time that plaintiff left the company, the corporation exercised its option to buy

back his shares at the price fixed by the accountants. In affirming the grant of summary judgment dismissing the negligence claim, this Court (per Tom, J.) found no indication that plaintiff ever met or even communicated with the accountants, or that the accountants were even aware that plaintiff owned company stock or that the stock would be repurchased by the employer client at a value fixed by the accountants. In sum, it found, the accountants' discharge of their routine responsibilities was completely unrelated to the corporation's purchase of plaintiff's stock (*Parrott v Coopers & Lybrand* (263 AD2d 316 [2000]).

Justice Rosenberger, relying primarily upon *Credit Alliance Corp.*, but also citing *Astor Terrace* among numerous other cases, dissented in part and would have found that, at the least, a question of fact existed as to whether the accountants knew that plaintiff left the company a month before they performed their latest analysis of the company's value (*Parrott,* 263 AD2d at 325-334).

Without mentioning *Astor Terrace*, the Court of Appeals affirmed in a short opinion (per Wesley, J.) noting that it had "previously rejected a rule 'permitting recovery by any "foreseeable" plaintiff who relied on [a] negligently prepared report, and [had] rejected even a somewhat narrower rule that would permit recovery where the reliant party or class of parties

was actually known or foreseen' but the individual defendant's conduct did not link it to that third party" (*Parrott*, 95 NY2d at 485, citing *Ossining Union Free School Dist.*, the same case cited by this Court in *Astor Terrace*). Thus, *Parrott* merely adhered to well settled legal principles and there is no conflict between *Parrott* and *Astor Terrace*, the only difference being the facts of each case. Clearly, if the Court of Appeals had intended to criticize or overrule our decision in *Astor Terrace*, it would have done so. Thus, *Parrott* in no way undermines our decision in *Astor Terrace*, which was recently cited with approval by this Court in *Castle Vill. Owners Corp. v Greater N.Y. Mut. Ins. Co.* (58 AD3d 178, [2008]), indicating that this court still considers *Astor Terrace* good law and entitled to stare decisis effect in this Court long after *Parrott* was decided. There is no need for the majority to strain reason in order to avoid admitting that *Astor Terrace* was correctly decided on facts that are legally indistinguishable from those in this case.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 8, 2009

CLERK